

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  HEART OF IOWA COMMUNICATIONS, INC.	DOCKET NO. TCU-02-2
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**ORDER APPROVING APPLICATION TO AMEND CERTIFICATE**

(Issued April 30, 2002)

On February 5, 2002, Heart of Iowa Communications, Inc. (Heart of Iowa), filed with the Utilities Board (Board) an application to amend its certificate of public convenience and necessity to allow it to serve a customer in an adjoining exchange. Heart of Iowa is a competitive local exchange carrier (CLEC) in the Steamboat Rock, Conrad, and Eldora exchanges pursuant to Certificate No. 0172. Pine Lake Corn Processors, L.L.C. (Pine Lake), proposes to build a new ethanol plant just across the exchange border in the Ackley exchange and asks that Heart of Iowa provide local exchange service to the plant. Heart of Iowa has therefore applied to amend its certificate to include in its existing service territory, only that part of the Ackley exchange that will be occupied by the new ethanol plant. Qwest Corporation (Qwest), the incumbent local exchange carrier (ILEC) in the Ackley exchange, has not objected to the application.

In its application, Heart of Iowa states that Pine Lake will be locating its ethanol production facility within the following area, which is currently served by Qwest in the Ackley exchange:

The area South of the centerline of 160<sup>th</sup> Street, West of the centerline of V Avenue, and East of the center line of Y Avenue.

Heart of Iowa states that this location is immediately adjacent to the Steamboat Rock exchange, which is currently served by Heart of Iowa. Heart of Iowa also states that the new Pine Lake ethanol plant will be located closer to Heart of Iowa's appropriate facilities than it is to Qwest's facilities.

Heart of Iowa indicates it intends to serve this specific area by extending its facilities in the Steamboat Rock exchange, using its existing NXX for Steamboat Rock under its existing tariff, and providing all service to the area as if it were part of the Steamboat Rock exchange. Heart of Iowa asserts that it will only need to provide physical connections to the specific area and amend its tariff. No additional interconnection agreements or tariffs to provide this service are necessary. Heart of Iowa supports its application with the affidavit of David L. Schmidt, General Manager.

The Board has carefully considered Heart of Iowa's application and will grant its application to amend its certificate to include the specifically described area of the Ackley exchange. The Board notes that while neither Qwest nor Heart of Iowa have filed a formal agreement outlining the exchange of the ethanol plant as a customer, Qwest has received notice of Pine Lake's request to have Heart of Iowa provide

service to the ethanol plant, in addition to this docket. Qwest has remained silent on the issue and has not raised an objection to Heart of Iowa's request.

Iowa Code § 476.29(8) (2001) provides in pertinent part:

An agreement between local exchange utilities . . . for exchange of customers between utilities, when approved by the board after notice to affected persons and opportunity for hearing, is valid and enforceable and shall be incorporated into the appropriate certificates. The board shall approve an agreement if the board finds the agreement will result in adequate service to all areas and customers affected and is in the public interest.

Absent a formal agreement, the Board acknowledges that this Code provision is not entirely on point. However, the public policy basis is instructive in this matter.

In addition, Heart of Iowa has demonstrated that it intends to provide service only to the specifically described area of the Ackley exchange, which encompasses Pine Lake's ethanol plant and is immediately adjacent to its existing service area.

Pine Lake's ethanol plant is a new customer in the Ackley exchange and extension of facilities by Heart of Iowa will be an efficient way to serve the plant. Moreover, based on the information set forth in Heart of Iowa's application and supporting affidavit, the Board finds that Heart of Iowa has sufficiently demonstrated that its service to this specified area will result in adequate service to all areas and customers served by Heart of Iowa and is in the public interest.

**IT IS THEREFORE ORDERED:**

1. The application for modification of its certificate of public convenience and necessity filed by Heart of Iowa Communications, Inc., on February 5, 2002, is granted, subject to the requirements that follow.

2. The Board will issue an amended certificate of public convenience and necessity allowing Heart of Iowa Communications, Inc., to provide facilities-based local exchange service to the portion of the Ackley, Iowa exchange, south of the center line of 160<sup>th</sup> Street, west of the center line of V Avenue, and east of the center line of Y Avenue, upon approval of an amendment to its tariff reflecting the addition of local exchange services to this area.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

**DISSENT**

I must respectfully dissent from the decision made by my colleagues to approve the application filed by Heart of Iowa to modify its certificate of public convenience and necessity. Heart of Iowa's proposal does not include the requisite transfer agreement with the incumbent local exchange carrier (ILEC). It also represents another departure from the historical exchange boundaries, further

opening the door to uneconomic “cherry picking” by competitive local exchange carriers (CLECs) and ILECs.

Iowa Code § 476.29(8) requires an agreement between the local exchange utilities prior to the transfer of customer service. The Board can approve such a transfer after notice to affected persons and opportunity for hearing, as long as the agreement results “in adequate service to all areas and customers affected and is in the public interest.” Heart of Iowa and Qwest did not file an agreement for the transfer of service to the new ethanol plant being built by Pine Lake Corn Processors. Consequently, this Code provision remains at issue.

Moreover, Iowa Code § 476.29(5) provides:

Each local exchange utility has an obligation to serve all eligible customers within the utility’s service territory, unless explicitly excepted from this requirement by the board.

The intent of this statute appears to prevent competitors, like Heart of Iowa, from picking and choosing their customers, i.e., to serve only those that are economically desirable. When the Board considers excepting a utility from the requirements of the statute, a significantly greater public benefit must be shown so as to preserve the Legislature’s intent of fair and economic competition in the marketplace.

I have long been a proponent of encouraging competition and enhancing service efficiencies in the telecommunications industry. Reasonable people could conclude that Heart of Iowa’s application should be approved in order to give its customer a choice, and I fully understand the decision of my colleagues on this point.

However, I feel that continued acquiescence in these unique circumstances could sacrifice a stronger position the Board may wish to take in the future against similar requests for exceptions.

The fact that the customer at issue is located adjacent to the exchange territory of the CLEC is not persuasive. Next time this Board may be asked to approve an application for service where the customer is not adjacent to the exchange. Instead, it may be one block away. Or one mile away. Or one township away. Where does the *de minimis* standard for variance approval lie?

In the interest of fair and economic competition I feel that, in the absence of a strong showing of economic justification, any local exchange carrier should offer service to all eligible customers in an existing exchange before being allowed to serve any customers in that exchange. The majority's decision allows local exchange carriers—in this case, it's a CLEC—to “cherry pick” customers. It also legitimizes a slippery slope of acceptable variances of requirements set forth in the Code. These are precedents I am not inclined to support.

/s/ Elliott Smith

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

Dated at Des Moines, Iowa, this 30<sup>th</sup> day of April, 2002.